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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Progress report of the United Nations High Commissioner for Human Rights on legal options and practical measures to improve access to remedy for victims of business-related human rights abuses

Summary

The present report is submitted pursuant to paragraph 7 of Human Rights Council resolution 26/22, in which the Council requested the United Nations High Commissioner for Human Rights to continue work to facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses. The report presents information on the accountability and remedy project of the Office of the United Nations High Commissioner for Human Rights on corporate accountability and access to judicial remedy in cases of business involvement in severe human rights abuses. It outlines the main work streams of the project, its two complementary research processes to gather data and input, and progress to date, and highlights initial findings and key areas for further investigation that are emerging from preliminary research and studies undertaken for two of the six work streams.

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I. Introduction

A. Background and mandate

1. Ensuring access to effective remedy for those affected by business-related human rights abuses is one of the three pillars of the Guiding Principles on Business and Human Rights (A/HRC/17/31, annex), which were endorsed by the Human Rights Council in June 2011. The right to a remedy for victims of human rights abuses is a core tenet of the international human rights system. In the Guiding Principles, it is recognized that ensuring access to effective remedy is part of the duty of all States to prevent human rights abuses from being committed within their territory and/or jurisdiction by third parties, including business enterprises. Guiding Principle 26 provides that States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

2. In the commentary to Guiding Principle 26, the challenges faced by individuals seeking remedies in cases of business-related human rights abuses are highlighted. Extensive research by civil society organizations and others into the accessibility and utility of judicial mechanisms as a means of obtaining remedy in cases of business-related human rights abuses have confirmed that those adversely affected by such abuses frequently struggle to access effective remedies. Particular problems have been noticed in cases that may amount to gross human rights abuses and international crimes, in which the combined effect of factors such as a lack of adequately functioning domestic judicial mechanisms, a lack of clarity about the relevant legal standards and fears of reprisals against victims and witnesses will often prevent victims from obtaining any redress at all.

3. In 2013, as part of its core mandate to advance the protection and promotion of human rights globally and of its ongoing work to advance the implementation of the Guiding Principles, the Office of the United Nations High Commissioner for Human Rights (OHCHR) commissioned an initial study into the effectiveness of domestic judicial mechanisms in cases of alleged business involvement in gross human rights abuses.[1] Reviewing empirical evidence from 11 different jurisdictions and around 40 legal cases, the study concluded that the present system of domestic law remedies for these kinds of cases is "patchy, unpredictable, often ineffective and fragile".[2] It outlined a number of areas where further clarification of policy and principle may help improve access to remedy for victims, and also called for more attention to be paid to the reasons behind the apparently

[1] Jennifer Zerk, "Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies", study prepared for OHCHR in February 2014 (http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx). The author notes that, in its *Interpretive Guide to the Corporate Responsibility to Respect Human Rights*, OHCHR writes that there is no uniform definition of gross human rights abuses in international law and she does not seek to establish her own definition. However, also according to the *Interpretive Guide*, the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including violations of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example if they take place on a large scale or are targeted at particular population groups. The *Interpretive Guide* is available from www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

[2] Jennifer Zerk, "Corporate liability for gross human rights abuses", p. 7.

very low number of business enterprises prosecuted in national courts for involvement in gross human rights abuses. After the study was published in February 2014, OHCHR invited all stakeholders to respond to the key findings.[1] This public consultation process took place in the first half of 2014. On the basis of the study's findings and the submissions received from stakeholders, OHCHR drew up plans for further work that underwent a process of expert review in September 2014. The OHCHR expert review group comprised representatives of States, United Nations agencies, business organizations, trade union representatives, law firms, barristers' chambers, academic institutions and civil society groups.

4. Recognizing the need for greater international focus on the issue of access to remedy and for additional guidance on the implementation of the pillar on access to remedy of the Guiding Principles, the Human Rights Council, in paragraph 7 of its resolution 26/22, requested the High Commissioner to continue work to facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses, in collaboration with the Working Group on the issue of human rights and transnational corporations and other business enterprises, to organize consultations with experts, States and other relevant stakeholders to facilitate mutual understanding and greater consensus among different views. The Council also requested the High Commissioner to publish a progress report on that work before its twenty-ninth session and to present a final report for consideration at its thirty-second session.

5. In November 2014, in response to the issues identified in the initial study and in subsequent submissions and expert meetings, and pursuant to the mandate from the Human Rights Council, OHCHR launched the accountability and remedy project to contribute to making domestic legal responses fairer and more effective for victims of business-related human rights abuses, particularly in cases of severe abuses. In accordance with Council resolution 26/22, OHCHR will submit a report on the outcomes and findings of the project at the Council's thirty-second session. The present report provides an overview of the project, its scope and methodology, progress to date and key findings emerging from various preparatory research activities.

B. Aims and scope

6. The overall aim of the accountability and remedy project is to develop recommendations and guidance for States on how to achieve a fairer and more effective system of domestic law remedies in cases of business-related human rights abuses, particularly in cases of severe abuses.

7. OHCHR understands a "fairer and more effective system of domestic law remedies" to be one in which all victims, without discrimination, have access to an effective remedy and no one is denied access to justice because of his or her location; in which victims are able to seek justice irrespective of their financial resources; that is based on clear standards of corporate behaviour; and in which enforcement and sanctions ensure accountability and contribute to preventing future harm.

8. To this end, the project has two key aims:

(a) To clarify standards and tests for corporate legal liability under domestic law;

[1] A summary of the submissions is available from www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/RemedyProject1.pdf.

(b) To develop credible and workable recommendations and guidance for States in relation to each of the six project components (see sect. II.A) to enable a stronger and more consistent implementation of the Guiding Principles, particularly in so far as business involvement in severe human rights abuses is concerned.

9. The decision to focus on cases of severe abuse in the first instance has been taken for strategic, substantive and methodological reasons. First, this prioritization is justified by the severity of impacts for victims. Second, as noted above, business involvement in gross human rights abuses poses a particular set of challenges in respect of access to remedy. Third, the steps already taken by many States to ensure that international crimes are punishable at the domestic level make it likely that focusing on the severest forms of human rights abuse will be the most useful and revealing starting point for close comparative analysis. However, this in no way implies that severe business-related human rights abuses should be the sole focus of States' regulatory action. On the contrary, mindful that the Guiding Principles address the full range of business-related human rights impacts, and that in many contexts it is impossible or undesirable to carve out specialist regimes for a particular class of human rights abuses, OHCHR will be examining the outcomes of the accountability and remedy project for lessons of relevance for access to remedy not only in the severest cases.

10. The accountability and remedy project will focus on judicial mechanisms for gaining access to remedy. This is not to diminish the importance of non-judicial mechanisms, which, as noted in Guiding Principle 27, are part of a comprehensive State-based system for the remedy of business-related human rights abuse. However, given the project's focus on the severest cases, which by their very nature may raise issues of possible criminal behaviour, it is appropriate to focus on domestic mechanisms responsible for enforcing criminal law. Data on the use of non-judicial mechanisms will be collected (see sect. II.B), as OHCHR recognizes the role that such mechanisms can play in reducing the costs of dispute resolution and in creating more opportunities for victims to access effective remedies. In order for States to effectively hold businesses to account and to ensure access to remedy in the severest cases, however, non-judicial mechanisms must be backed up by effective judicial mechanisms.

11. Finally, although the project focuses on access to remedy issues, there is a need for both States and businesses to make concerted and increased efforts to develop better preventive practices and policies with respect to business-related human rights abuses. While the development of preventive practices and policies are beyond the scope of the project, the methodology recognizes the relationships that can exist between the preventive efforts of a business enterprise and its legal risks and culpability. As part of the project, input will be gathered from many different jurisdictions on issues such as the bearing that human rights due diligence may have on legal liability and sanctioning, in order to better explore the linkages that exist between prevention and legal liability. This will be done to ensure that the practical recommendations arising from the project address, to the extent possible, the need for prevention as well as remedy.

12. The mandate of the accountability and remedy project is separate from, but potentially complementary to, the decision made by the Human Rights Council in its resolution 26/9 to establish an open-ended intergovernmental working group on human rights and transnational corporations and other business enterprises to elaborate an international legally binding instrument. The project is not linked to the negotiations on that instrument. However, if the intergovernmental working group so decides, it could draw upon material emerging from the project in its discussions.

II. Accountability and remedy project

A. Overview of project components

13. The accountability and remedy project comprises six distinct but interrelated components. Each component has been chosen based on issues identified in research and consultations as requiring further clarification in terms of policy and principles. The components have also been selected for their strategic value and the potential they have to result in outcomes that can make a practical difference for affected stakeholders in the short-to-medium term. Each component is distinct and has its own methodology, but is linked in important ways to the others. In all cases, the methodology is based on inclusive multi-stakeholder and expert inputs and consultations. The six project components are the following:

(a) Project component 1, on domestic law tests for corporate accountability. This component will clarify how different domestic legal systems attribute and assess corporate legal liability for serious human rights abuses. It will identify good practices to guide States in deciding which factors need to be taken into account in assessing corporate liability in cases of alleged involvement in serious human rights abuses. Information will be gathered primarily through the global online consultation and the detailed comparative process described below (see sect. II.B);

(b) Project component 2, on the roles and responsibilities of interested States. This component will explore State practices and attitudes with respect to the appropriate use of extraterritorial jurisdiction and domestic measures with extraterritorial implications. It will identify good practices to guide States in managing cross-border cases and explore possible models of international and bilateral cooperation. Analyses will primarily take place through face-to-face work with government representatives, which will be complemented by multi-stakeholder consultations and discussions. Preparatory studies of State practice have been carried out in relation to labour rights issues and current State practices and attitudes with respect to the use of extraterritorial jurisdiction, examples of which are provided through amicus curiae briefs by sovereign States in cases involving the alien tort statute in the courts of the United States of America. The findings of these preparatory studies will be used to inform future work and discussions (see sects. III.B-C);

(c) Project component 3, on overcoming financial obstacles to legal claims. This component will look at strategies and practices to assist claimants who would otherwise be prevented from accessing judicial mechanisms owing to legal costs, and result in guidance on "minimum steps" and "good-practice options" for States. Information will be gathered primarily through the global online consultation and the detailed comparative process described below (see sect. II.B). To complement these processes, OHCHR has also conducted a review of recent comparative research in relation to the costs of bringing legal claims under private law (see sect. III);

(d) Project component 4, on criminal sanctions. This component will survey current and emerging State practice in relation to criminal sanctioning of corporations for serious human rights abuses and identify "good-practice models" for States, taking into account innovations from other areas of criminal law. Information will be gathered primarily through the global online consultation and the detailed comparative process described below (see sect. II.B);

(e) Project component 5, on civil law remedies. This component will survey current and emerging State practice in relation to civil law (private law) damages in cases of serious corporate human rights harm, explore the role of domestic judicial mechanisms in relation to the supervision and implementation of settlements and awards, and identify

possible "good-practice models" for States, taking into account innovations from other areas of private law. Information will be gathered primarily through the global online consultation and the detailed comparative process described below (see sect. II.B);

(f) Project component 6, on practices and policies of domestic prosecution bodies. This component aims to investigate the reasons behind the apparently very low levels of activity by domestic criminal law enforcement agencies in relation to alleged business involvement in gross human rights abuses. It will seek to identify challenges faced by domestic prosecutors in such cases and to develop a set of recommendations for States on ways to begin addressing those challenges. Information will be gathered and analysis will be conducted primarily through face-to-face work with prosecutors and other experts from law enforcement, regulatory bodies and academic institutions.

B. Global online consultation and detailed comparative process

14. The accountability and remedy project research process has been designed to make sure that any recommended action is well-directed and capable of improving access to justice for victims at a practical level. Whether legal, practical or technological interventions are called for, they must be capable of responding to local needs, structures and contexts. Local knowledge and insight is needed to ensure that proposals are capable both of being implemented and of producing the desired results. This requires engagement with experts in a wide range of jurisdictions, across different geographical areas, legal systems and traditions and stages of economic development.

15. To maximize the time and resources available, information for four of the six projects is being gathered through two complementary research processes: the global online consultation, which consists of a global online survey; and the detailed comparative process, which consists of a focused, in-depth research process into 25 focus jurisdictions.

16. The information from both processes will be reviewed and analysed by independent expert academic reviewers who have agreed to contribute their time and expertise to the project. The methodology aims to include a wide range of stakeholders in the research and information-gathering process and to subject all findings to thorough multi-stakeholder consultations. Both processes will continue until August 2015, at which point OHCHR will begin project-specific analysis in collaboration with stakeholders and academic experts.

17. At the time of submitting the present report, the global online consultation was being prepared for launch at the end of April 2015. The consultation consists of a global online survey in English, French and Spanish through which all stakeholders with relevant knowledge of a jurisdiction may submit information. The survey covers tests for assessing corporate legal liability under criminal, quasi-criminal and civil law; funding options for legal claims; criminal and quasi-criminal law sanctions; civil law remedies; and issues related to the work of domestic prosecution bodies in bringing cases against business enterprises. The consultation will remain open until 1 August 2015.

18. OHCHR encourages all relevant stakeholders, in particular States, to contribute to the project by submitting information through the global online consultation. Gathering information on a wide range of jurisdictions is critical to helping to ensure that the recommendations for each project take into account the realities on the ground. The global online consultation seeks to ensure that data is collected from the widest possible range of jurisdictions, with the aim of ensuring that the eventual outputs and findings take account of a broad range of legal traditions and systems, respond to the actual situations encountered in different States and are fit-for-purpose for all States. It is also an opportunity for all stakeholders to provide comments about opportunities and challenges and information about relevant cases and situations they have encountered.

19. The detailed comparative process is a focused, in-depth research process comprising legal research done by legal experts in relation to 25 focus jurisdictions, the results of which will be used for comparative analysis. The 25 jurisdictions have been carefully chosen to reflect geographical and regional diversity, as well as a diversity of legal systems and traditions and levels of economic development. The process comprises two tracks, the first of which focuses on legal research into the current laws in the focus jurisdictions and the second of which focuses on gathering practical experiences and perspectives from public interest lawyers and others who represent victims of business-related human rights abuses before the courts.

20. At the time of submitting the present report, the detailed comparative process had commenced for most of the selected focus jurisdictions. After reports on the results arising from the two tracks have been submitted, OHCHR will work with academics to review the information received and help contextualize it with reference to the overall legal system and broader social and economic issues of each focus jurisdiction.

C. Future consultations and next steps

21. Subject to obtaining sufficient resources, OHCHR plans to hold expert meetings and consultations for each of the six projects starting in September 2015 and to be completed by the first quarter of 2016. In collaboration with the Working Group on the issue of human rights and transnational corporations and other business enterprises, initial findings and analysis from the projects under the accountability and remedy project will be presented at the Forum on Business and Human Rights to be held in Geneva from 16 to 18 November 2015, to enable multi-stakeholder discussion in a public format.

22. Initial findings and areas for further inquiry arising from the activities undertaken to date are outlined in section III below.

III. Preliminary research: key outputs and issues

A. Preparatory work relating to project component 2: roles and responsibilities of interested States

23. As noted above, project component 2 of the accountability and remedy project will explore State practice and attitudes with respect to the appropriate use of extraterritorial jurisdiction and domestic measures with extraterritorial implications. It will identify good practices to guide States in managing cross-border cases and explore possible models of international and bilateral cooperation.

24. Not all cases involving allegations of business-related human rights abuses raise cross-border issues. In cases where those involved are all located in and the relevant facts have all taken place in a single jurisdiction, questions of extraterritorial jurisdiction and international cooperation may not arise. However, cases of business involvement in serious human rights abuses do frequently involve a cross-border element. In many cases, this is because those involved are located in more than one jurisdiction or because other connecting factors to a prosecution or dispute (such as material actions or decisions) are alleged to have occurred or been made in different jurisdictions.

25. Cross-border cases give rise to a particular set of difficulties for domestic law enforcement bodies, prosecutors and victims. Extensive research by civil society organizations and others has documented the many challenges involved in accessing judicial remedy in these kinds of cases. These comprise legal challenges (such as

establishing personal and subject-matter jurisdiction, identifying the correct set of legal rules to apply to the case and problems relating to enforcement) and many practical and logistical issues associated with gathering information and the availability of witnesses.

26. The current debate about the appropriate use of extraterritorial jurisdiction in respect of cases of business-related human rights abuses takes place against this background. A key aim of project component 2 will be to find ways to build on existing State practice, including from other regulatory areas, to propose practical solutions to challenges that are frequently encountered in cross-border cases.

27. Project component 2 takes, as its starting point, Guiding Principle 2, which calls upon States to set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. In the commentary to the Principle, it is noted that States have adopted a range of approaches in this regard, including the establishment of criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. It is also noted that various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement. A number of the treaty bodies that monitor the implementation of the core international human rights treaties have also taken the view that the responsibilities of State parties under the conventions include taking appropriate steps to ensure that the actions of enterprises domiciled in their territory or jurisdiction do not infringe on human rights in other countries.[4]

28. Further important context for project component 2 is provided by Guiding Principle 7, which states that because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses. Furthermore, Guiding Principle 26 stipulates that States should consider ways to reduce legal, practical and other relevant barriers that could lead to a denial of remedy. In the commentary to Principle 26, it is noted that legal barriers can arise, for example, . where claimants face a denial of justice in a host State and cannot access to the home State courts regardless of the merits of the claim.

29. Previous research into State practice in other regulatory areas has helped to shed light on the use by States of extraterritorial jurisdiction and domestic measures with extraterritorial implications in practice.[5] In recent years, States have been increasingly prepared to use direct extraterritorial jurisdiction in relation to criminal activity such as

[4] See Committee on Economic, Social and Cultural Rights general comment No. 15 and the Committee's statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights (E/C.12/2011/1) and the Committee on the Rights of the Child general comment No. 16. A number of treaty bodies have recommended that States take appropriate measures to regulate the extraterritorial conduct of enterprises domiciled in their territory or jurisdiction (see, for example, CERD/C/AUS/CO/15-17, para. 13; CRC/C/AZE/CO/3-4, para. 29; CRC/C/BHR/CO/2-3, para. 21; CRC/C/ITA/CO/3-4, para. 25; and CRC/C/KOR/CO/3-4, para. 27). A number of human rights advocates and experts have also endorsed the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, including in the context of non-State actors. While these principles have not been endorsed or adopted by the United Nations system, they provide information about the views of many human rights experts on the issue of extraterritorial responsibilities under human rights treaties.

[5] Jennifer Zerk, "Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas", June 2010 (www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf).

terrorism, money-laundering, corruption, grave human rights abuses and sexual offences against children. Looking at these different areas, certain patterns can be identified in relation to the uses of and reactions to extraterritorial jurisdiction and domestic measures with extraterritorial implications. For instance, these measures are more likely to be viewed by affected States as reasonable if the regulation is authorized under a bilateral or multilateral regime, is designed to deal with an issue of international concern (rather than primarily domestic interests), has been developed in consultation with and takes account of the interests of other States and includes procedures for the resolution of competing jurisdictional claims.

30. This research has also highlighted the various options that may be open to States to help overcome the practical problems that are commonly encountered in cross-border cases. In relation to bribery and corruption, for instance, law enforcement bodies of different States have carried out joint investigations and have entered into case-specific agreements as to appropriate enforcement strategies and the sharing of financial penalties.

31. Following up on the recommendations emerging from the initial study commissioned by OHCHR in 2013 into the effectiveness of domestic judicial mechanisms, project component 2 will consider the extent to which models of international cooperation and lessons on the use of extraterritorial jurisdiction from other regulatory areas can be applied to help overcome challenges in relation to cross-border cases concerning severe business-related human rights abuses.

32. At the time of submitting the present report, two separate preliminary studies for project component 2 had been completed. While they dealt with very different subject matters, they had a common underlying aim, namely to gather empirical evidence with the potential to shed light on State practice and attitudes with respect to the appropriate use of extraterritorial jurisdiction and domestic measures with extraterritorial implications.

B. Review of State interventions in respect of assertions of extraterritorial jurisdiction by United States courts in alien tort statute cases

33. The alien tort statute (United States Code, Title 28, sect. 1350) grants jurisdiction to United States federal district courts in respect of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. In recent decades, plaintiffs have sought to use the statute to bring claims in United States courts for violations of human rights committed overseas, including in cases alleging abuses by business enterprises domiciled outside the United States. While the number of successful cases is small, victims and their representatives have seen the statute as an important means for redress where claimants are not able to obtain remedy through the courts of the State in which the alleged abuse occurred. By their nature, these cases invoke questions about the appropriate assertion of extraterritorial jurisdiction. In a number of cases involving the statute, States and State agencies have intervened in the litigation by way of letter, declaration or (most commonly) amicus curiae briefs expressing views about the appropriate limits of jurisdiction in the particular case or, more generally, as a matter of policy. The aim of this study was to review as many of these State interventions as possible and to consider what they might reveal about past and current State practices and views with respect to the use of extraterritorial jurisdiction in cases involving allegations of business involvement in serious human rights abuses. In particular:

(a) What are the main arguments used for and against the use of extraterritorial jurisdiction in human rights cases?

(b) How do these arguments differ from arguments for and against extraterritorial jurisdiction in other regulatory areas?

(c) To what extent is there already consensus between States as to the circumstances in which the use of extraterritorial jurisdiction should be prohibited, tolerated or encouraged in human rights cases and the limits that should be observed?

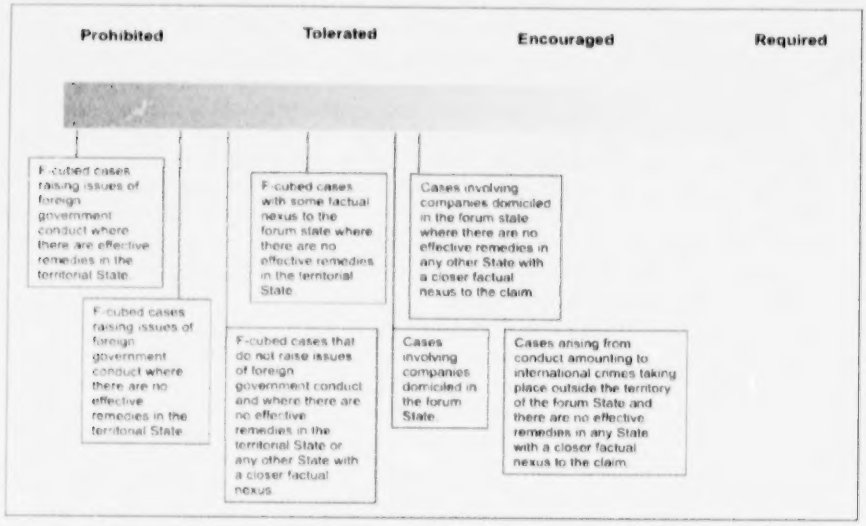
(d) What do States view as the best safeguards against "excessive" claims of extraterritorial jurisdiction and how can jurisdictional conflicts best be resolved?

34. The review was carried out in April 2015. Information contained in legal databases revealed that State interventions in relation to jurisdictional issues, numbering around 30, had been made in at least 10 separate legal cases. These briefs and submissions (originating in 12 different jurisdictions) were then reviewed; arguments for and against extraterritorial jurisdiction and case-specific comments and concerns were also noted. It is recognized that these amicus curiae briefs and other interventions were filed and made in a legal context that predates the landmark 2013 decision of the United States Supreme Court in *Kiobel v. Royal Dutch Petroleum*. However, this does not diminish the significance of these documents as evidence of past and current State practice and attitudes with respect to the use of extraterritorial jurisdiction in civil cases raising allegations of business involvement in serious human rights abuses.

35. Only a small number of States have made interventions in cases involving the alien tort statute on jurisdictional matters. Of these, the United States is the State that has intervened most frequently by far, followed by States that have been States of domicile for defendant companies in specific cases. Only a tiny number of States have ever sought to intervene in cases involving the alien tort statute concerning activities and alleged abuses taking place in their own territories. This means that it is impossible to draw definite conclusions about the extent to which there may be a consensus about the use of extraterritorial jurisdiction in human rights cases from this data alone. It should also be recognized these briefs cover several decades, and that views and attitudes within a State may have shifted, especially where administrations have changed. However, the study findings do help to shed light on the kinds of case scenarios in relation to which extraterritorial jurisdiction has been opposed, the degrees of opposition which have existed in different kinds of cases and the case scenarios in which exercises of extraterritorial subject-matter jurisdiction were more likely to have been accepted.

36. Based on the State amicus briefs and other interventions reviewed in the course of this study, the figure below is an attempt to plot where various kinds of cases may sit on a spectrum of possible State attitudes to exercises of extraterritorial subject-matter jurisdiction in cases of allegations of corporate involvement in serious human rights abuses, from "prohibited" at one extreme to "required" at the other. The study did not uncover any evidence of State practice to suggest that there may be business-related human rights cases in relation to which the exercise of extraterritorial subject-matter jurisdiction is required as a matter of customary international law, or even encouraged as a matter of policy. However, there are a number of other possible scenarios that fall elsewhere on the spectrum, between "prohibited" and "tolerated".

Illustration of the possible spectrum of State attitudes to exercises of extraterritorial jurisdiction in different scenarios, as indicated by the content of State interventions in alien tort statute cases


Prohibited
Tolerated
Encouraged
Required
F-cubed cases raising issues of foreign government conduct where there are effective remedies in the territorial State
F-cubed cases raising issues of foreign government conduct where there are no effective remedies in the territorial State
F-cubed cases with some factual nexus to the forum state where there are no effective remedies in the territorial State
F-cubed cases that do not raise issues of foreign government conduct and where there are no effective remedies in the territorial State or any other State with a closer factual nexus
Cases involving companies domiciled in the forum state where there are no effective remedies in any other State with a closer factual nexus to the claim
Cases involving companies domiciled in the forum State
Cases arising from conduct amounting to international crimes taking place outside the territory of the forum State and there are no effective remedies in any State with a closer factual nexus to the claim

Note: The figure has been prepared for discussion purposes only. It is based on the indications provided by the content of State interventions in alien tort statute cases, which, as acknowledged above, have been made only by a small number of interested States. It does not represent, and should not be taken as representing, the views of OHCHR as to the legality or desirability (or otherwise) of exercises of extraterritorial jurisdiction in different scenarios, or of the criteria that should be applied to determine legality. In the figure above the term "F-cubed" is used for cases where the claim is brought by foreign plaintiffs, against foreign defendants, in relation to foreign business activities.

37. In addition, the review of amicus curiae briefs highlights several areas of uncertainty and possible differences of approach between States in relation to key issues such as "universal civil jurisdiction", the applicability of a doctrine of "exhaustion of legal remedies", the extent to which a factual nexus is required between the claim and the State in which the dispute is litigated (i.e. the "forum State") for the courts of the forum State to be able to exercise jurisdiction at all and, finally, the extent to which the nature and severity of the abuse may have a bearing on the way that jurisdictional rules are applied. The questions arising from this study in relation to these specific issues, as well as the broad study findings, will be explored more fully in the interactive sessions with government representatives due to take place later in 2015 (subject to OHCHR obtaining sufficient funds), as part of the planned programme of work under project component 2.

C. Survey of key provisions and State practice under selected International Labour Organization instruments

38. As part of its preparatory work for project component 2, OHCHR identified a need to better understand the extent to which States already cooperate with respect to business-related human rights abuses, and the different forms this cooperation may take. To this end, OHCHR conducted a review of the terms of and State practice pursuant to selected

International Labour Organization (ILO) treaties and protocols, aimed at combating two specific areas of business-related human rights abuses, namely forced labour and the worst forms of child labour.[6] The aims of the study were:

(a) To examine the approach of certain ILO treaties to cross-border issues and problems, in particular the extent to which States parties are required to regulate foreign parties and conduct and cooperate in respect of the identification, investigation and enforcement of offences;

(b) To clarify the geographical scope of treaty provisions relating to access to remedy;

(c) To gather information relating to State practice under these treaty provisions in order to gain an insight into how States parties are interpreting their treaty obligations with respect to regulation, enforcement and access to remedy in practice.

39. OHCHR carried out the project in February and March 2015 as a desk review, with inputs from ILO. The review of international instruments focused on key treaties and ILO recommendations relating to forced labour and the worst forms of child labour. In addition, given that migrant workers and members of indigenous communities are at particular risk of such abuses, the review also covered ILO treaties relating to these groups. To gain a better understanding of State practice in relation to the two focus areas, the review was followed by an analysis of the most recent comments of ILO treaty monitoring bodies in relation to a sample group of 35 jurisdictions (which included the 25 focus jurisdictions selected for the purposes of the detailed comparative process).

40. The results of the preliminary study suggest that, even where States parties are strongly encouraged to consider the use of extraterritorial jurisdiction to combat serious human rights abuses by its own nationals, this is a regulatory method that is resorted to rarely in practice and then only in relation to a narrow range of offences. The measures implemented by States parties with respect to business enterprises seem to focus almost entirely on cases affecting human rights within the national territory. No examples of measures aimed specifically at addressing extraterritorial impacts of business enterprises were identified in the course of the study, although examples of "domestic measures with extraterritorial implications", such as public information campaigns that are delivered through foreign diplomatic missions and the close monitoring of recruitment organizations, were identified. In addition, the study identified many and varied examples of international and regional cooperation initiatives. These included information-gathering and information-sharing initiatives to aid the detection of crimes, technical assistance, capacity-building and awareness-raising projects, bilateral and regional agreements covering operational matters and initiatives aimed at informing people of their rights and victims of abuse of where to get help.

D. Preparatory work relating to project component 3: overcoming financial obstacles to legal claims

41. Successive investigations into barriers to accessing remedy, including the initial study commissioned by OHCHR in 2013, confirm that financial obstacles to legal claims can be among the most difficult to overcome in practice. This is also recognized in the Guiding Principles. In the commentary to Principle 26, it is noted that practical and procedural barriers to accessing judicial remedy can arise where the costs of bringing

[6] The full study is available from www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through government support, "market-based" mechanisms (such as litigation insurance and legal fee structures) or other means.

42. The initial study commissioned by OHCHR in 2013 highlighted many differences between jurisdictions with respect to the extent to which States have taken steps to reduce financial obstacles to legal claims and the availability and operation of various options to reduce costs and financial risks in practice. These differences, (together with other factors identified in the study), are contributing to a number of structural problems in the overall domestic remedial system, including inequalities in levels of legal protection and, arguably, distortions in patterns of use of judicial mechanisms which may have implications for legal development and access to justice in the longer term. Because of the short-, medium- and long-term strategic significance of legal funding issues, overcoming financial obstacles to legal claims has emerged as a key theme for future work by OHCHR and, as such, will be addressed through a dedicated work stream in the OHCHR accountability and remedy project. Project component 3 will look at strategies and practices to assist claimants who would otherwise be prevented from accessing judicial mechanisms owing to legal costs, and result in guidance on "minimum steps" and "good-practice options" for States.

43. OHCHR has identified the need for further research to be carried out, not just in respect of the efficacy of different regulatory options but also in respect of the packages of options that, taken together, are most likely to produce optimal outcomes and the feasibility of the options against the background of different legal structures and conditions and levels of economic development. Detailed information (relating to matters such as the availability of government support in business and human rights cases, other third-party funding sources, pro bono help, conditional and contingency fee arrangements, cost shifting rules and other methods and rules that have implications for the costs of litigation to individual claimants) will be collected from as many different jurisdictions around the world as possible through the global online consultation and, in respect of the 25 focus jurisdictions, through the detailed comparative process. As part of these processes, stakeholders will be asked for their views as to the efficacy of different measures and groups of measures, and how these may be improved. This feedback will be taken into account in the development of the practical guidance referred to above.

44. The research methodology used by OHCHR for project component 3 has been informed by past and ongoing investigations into the costs of civil and criminal procedures at the domestic level. Preparatory work for the component included a review of the data and research findings compiled by researchers from the University of Oxford during 2009 following a study of the costs and funding of civil litigation in more than 30 jurisdictions around the world.[7]

45. The Oxford study highlights a number of trends of relevance for future work on the accountability and remedy project. These include the significant contraction in the availability of legal aid that is taking place in many States, the growing interest in contingency fees (including in States that have traditionally shown strong cultural resistance to the idea of lawyers being paid a percentage of civil damages), developments in litigation insurance markets and the arrival of third party litigation funders. Other insights from the Oxford study have implications for the project more generally, including the unintended consequences that can result from piecemeal regulatory reform and the need for a proper understanding of the linkages between different access to justice measures that affect their efficacy in practice. Finally, the Oxford study provides a reminder that issues

[7] Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, eds., *The Costs and Funding of Civil Litigation: a Comparative Perspective* (Oxford, Hart Publishing, 2010).

relating to financial obstacles to legal claims cannot be divorced entirely from wider questions about the structure and efficiency of civil redress systems. This is because there are many aspects of civil procedure and legal principle, covered in other work streams of the project (see sect. II.A),that will have implications for the legal costs and levels of financial risk faced by claimants.

46. While this potentially raises many more issues than the accountability and remedy project can realistically cover, OHCHR recognizes the importance of efficiency and cost-reduction measures as part of an overarching strategy to address financial obstacles to legal claims. Therefore, OHCHR will be gathering information and feedback on domestic initiatives to improve the efficiency and functioning of judicial mechanisms specifically in the context of cases concerning business-related human rights abuses, in addition to information relating to different funding options. The information sought includes information about how judicial mechanisms are presently making use of, or considering making use of, technological and other advances to streamline and simplify judicial processes.

IV. Concluding observations

47. **In recognition of the need for a greater international focus on the issue of access to remedy in cases of business-related human rights impacts, and in response to Human Rights Council resolution 26/22, OHCHR has launched the accountability and remedy project. The project aims to contribute to making domestic legal responses fairer, more accessible and more effective for victims of business-related human rights abuses, particularly in cases of severe abuse. In accordance with its mandate from the Council, OHCHR will present the conclusions and findings arising from the project in a final report for consideration by the Council at its thirty-second session. The present report contains an overview of the scope, aims and progress of the project.**

48. **Much of the information for the accountability and remedy project will be gathered through two overarching processes: a global online consultation, which takes the form of a global online survey, and a detailed comparative process, which is a more focused in-depth research process into 25 focus jurisdictions. The global online consultation will be open until 1 August 2015 and can be accessed through the OHCHR website. OHCHR encourages all States to complete the survey in order to help ensure that the project findings will have the broadest possible research basis and that the eventual findings and outputs are appropriate to a wide range of jurisdictions. OHCHR also encourages all other relevant stakeholders, including lawyers, academic researchers, trade union representatives, civil society organizations, stakeholders, businesses and business organizations and others to complete the survey.**

49. **An online information hub has been established for the accountability and remedy project through a dedicated portal hosted by the Business and Human Rights Resources Centre.[8] This website and the OHCHR website contain essential information about the project that will be updated as progress is made.**

50. **The findings of the preparatory work carried out under project component 2 (see paras. 33-40) will be used to help inform preparations for, and give practical context to, interactive workshop discussions on the cross-border regulatory and**

[8] See http://business-humanrights.org/en/ohchr-launches-%E2%80%9Caccountability-and-remedy-project%E2%80%9D.

enforcement issues and challenges posed by business involvement in gross human rights abuses. These discussions are scheduled to take place in the latter half of 2015, subject to OHCHR obtaining sufficient funds. The aims of these workshops will be:

(a) To clarify the legal and practical problems that can arise in cross-border cases;

(b) To understand the ways in which existing views of roles and responsibilities are likely to shape State responses;

(c) To draw from experience from other regulatory fields in order to consider ways that States can work together cooperatively to address the challenges that arise in cross-border cases;

(d) To test and give participants the opportunity to react to different possible models of international cooperation;

(e) To identify the possible elements of a principled basis for appropriate action in relation to jurisdictional matters.

51. The preparatory work relating to project component 3 (see paras. 41-46) will enable that part of the project to progress effectively and efficiently and in a way that builds on previous academic study. As noted above, insights from the Oxford study have been valuable in helping to shape the relevant parts of the detailed comparative process and the global online consultation.

52. The accountability and remedy project comprises six distinct work streams (see para. 13), each of which has been selected based on issues identified in previous OHCHR research as requiring further clarification in terms of policy and principle, and for its strategic value. Each project is distinct and has its own methodology, but there are important interrelationships between them.

53. Findings from all six work streams, and any recommendations and guidance arising from this work, will be subject to stakeholder consultation between September 2015 and the first quarter of 2016. In addition, initial findings and analysis from these projects will be presented at the Forum on Business and Human Rights to be held in Geneva from 16 to 18 November 2015 to enable multi-stakeholder consultation in an open format.